COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 053140-99**

Paul L. LaGrasso	Employee
Olympic Delivery Service, Inc.	Employer
American Compensation Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Levine and Wilson[1])

APPEARANCES
Steven P. Brendemuehl, Esq., for the employee
Diane J. Bonafede, Esq., for the insurer

COSTIGAN, J. In the decision before us on the insurer's appeal, the administrative judge found that on August 2, 1999, the employee, then age forty-eight and working as a courier/delivery man, suffered an injury to his left knee when his leg locked as he stepped out of the van he had been driving, and he fell down. (Dec. 4; Tr. 27-28.[2]) That knee was already compromised by prior work-related injuries in 1971 and 1985, both of which resulted in surgery. (Dec. 3-4; Tr. 16-24.) The administrative judge determined that the injury was compensable, finding that it arose in the course of Mr. LaGrasso's employment, (Dec. 5-6), and was an aggravation of his pre-existing knee condition constituting "a major but not necessarily predominant contributing cause" of his ongoing knee condition and the need for medical treatment. (Dec. 6-7.) The judge ordered the insurer to pay

[1] Judge Wilson no longer serves on the reviewing board.

[2] The employee testified that "as I was stepping [out of my truck], my leg locked, and I just went right down like a barrel, boom. And, you know, I stayed there for a few minutes. I got up. I was sore. I was almost in tears over this thing. That is how sore it was." (Tr. 27-28.) He did not testify that he twisted his left knee before he fell, nor did he testify that he fell directly onto the knee.

G. L. c. 152, §§ 13 and 30, medical benefits for total knee replacement surgery.[3]

The insurer cites three errors in the judge's decision as requiring reversal of his liability and causal relationship findings, and the award of medical benefits. First, as to liability, it argues that the judge improperly relied on medical reports not in evidence to find that the employee sustained a work-related injury. Second, as to causal relationship, it contends that the judge misconstrued and mischaracterized the § 11A impartial medical examiner's opinions on the "a major" causation standard of § 1(7A). Third, as to the award of medical benefits, it argues that the sole medical opinion properly in evidence -- consisting of the § 11A report and deposition testimony of Dr. Norman P. Goguen -- does not support the judge's conclusion that the proposed knee replacement surgery was reasonable and necessary, and therefore the insurer's responsibility. For the reasons discussed in order below, we see merit in all three of the insurer's arguments. Therefore, we vacate the judge's award of medical benefits and recommit the case for liability and causal relationship findings based on the record evidence.

Reliance on Medical Reports Not in Evidence

The insurer on appeal challenges the judge's finding that the incident of August 2, 1999 was a compensable work injury. It points to the testimony of the § 11A impartial physician, who examined the employee on December 19, 2000, that if the employee's knee merely locked, causing him to fall, then his condition when examined "relates to the progression of his [pre-existing] arthritis" and was neither an aggravation nor a new injury. (Dep. 41-43.) The insurer argues that according to the impartial physician, only if the employee twisted his left knee and

[3] Following the August 2, 1999 incident, the employee was out of work for only a couple of days. He then returned to light duty work for approximately one week, and thereafter resumed his regular work on a full-time basis. (Dec. 4.) At the time of the hearing, he had not yet undergone the total knee replacement surgery which was the subject of his claim. Thus, the employee made no claim for weekly incapacity benefits.

then fell on it, which was the history the employee gave the doctor, would his subsequent knee condition be causally related to that work incident. (Dep. 42.)

The insurer's citation to that one aspect of the impartial physician's opinion as to *medical* causation is selective and misleading, as it ignores the potential *legal* import of the fact, found by the judge, that the employee fell to the ground when his knee locked as he was stepping out of the van. (Dec. 7.) Moreover, Dr. Goguen confirmed that the history he received from the employee was that the knee locked and he fell "directly on it." (Dep. 6.) In his report, the doctor stated:

> *The fall on 8/2/99* precipitated an aggravation of the condition and with the knee being marginal, a fall could have aggravated this to the point where symptoms have been ongoing for a year and a half with recurrent episodes of swelling and pain. I believe the injury of 8/2/99 aggravated the underlying condition and that aggravated condition is ongoing.

(Ex. 2, emphasis added.) Even when asked by the insurer at deposition to assume that due to his pre-existing knee condition, the employee had experienced good days and bad days, with episodes of swelling, pain and locking, prior to the August 2, 1999 van incident, Dr. Goguen opined that

> even [if] he had some of these episodes, one episode did trigger off the final blow that has made his disability keep going. And I stand by my belief the injury of 8/2/99 aggravated the under[lying] condition and the under[lying] aggravation and it is ongoing.

(Dep. 37.) Dr. Goguen also testified that the incident was "a major" aggravation of the employee's underlying condition. (Dep. 38-39.)

However, the following exchange between insurer's counsel and the doctor provides the springboard for the insurer's argument that the judge improperly relied on medical reports not in evidence:

Q. What is it about the incident of 8/2/99 that you believe aggravated the condition?
A. The nature of the injury.
Q. Which was what?
A. The twisting of the knee as the history was given to me and a fall upon the knee.
Q. Was the fall a significant portion landing on the knee?

A. I don't know which is – is the more significant.
Q. It could either be the twisting or the fall?
A. Yes.

(Dep. 42.)

The impartial physician's opinion as to causal relationship changed, depending on whether he assumed the mechanism of injury described to him by the employee, or those the insurer, at deposition, asked him to assume. However, the distinctions the doctor drew between and among the histories of the employee's knee simply locking, of a locking and falling, and of a twisting, locking and falling, did not dissuade the judge from finding that the employee suffered a compensable work-related injury, although it is not at all clear that the judge found as a fact that the employee twisted his knee before it locked and he fell:

> [The Insurer] points to inconsistencies with respect to whether the Employee's knee locked or twisted and then locked as evidence that the injury did not actually occur. The Employee described to the § 11A impartial physician that [sic] "that his left knee locked on him and he went immediately to the ground." . . . In his Claim for workers' compensation, the Employee described his injury as a "twisted knee." *He apparently also described to the attending physician at New England Medical Center at his August 3, 1999 visit, that he had twisted his left knee* . . . . While the Insurer is diligent and attentive in raising these defenses, *I find the testimony of the Employee credibly supports that he sustained a workplace injury on August 2, 1999.* The Employee testified under oath that he was injured in the course of employment, stating, "as I was stepping, my leg locked, and I just went right down like a barrel." . . . *Based on this testimony and the medical records from New England Medical Center dated August 3, 1999, which indicated that swelling and pain in the left knee had resulted from "stepping out of van yesterday," I find that the Employee sustained an injury in the course of his employment.*

(Dec. 5, emphasis added; footnotes omitted.)

Generally, a judge's credibility findings are final and immune from appellate review. See Nee v. Boston Medical Ctr., 16 Mass. Workers' Comp. Rep. 265, 266 n.1 (2002), citing Lettich's Case, 403 Mass. 389, 394 (1988). However,

" '[l]ike other findings, findings on credibility must be based on the evidence of record. If they are not, they are arbitrary and capricious.' " Pinhancos v. St. Luke's Hosp., 17 Mass. Workers' Comp. Rep. 413, 419-420 (2003), quoting Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 374 (2002); Frager v. M.B.T.A., 17 Mass. Workers' Comp. Rep. ___ (November 26, 2003).

The insurer argues that the judge's finding of a compensable personal injury is tainted by his reliance on an August 3, 1999 emergency room report, which was not in evidence. (Insurer brief, 8-9.) It advances that same argument with respect to the reports of Dr. Ferrone, the employee's treating physician. (Insurer brief, 9.) We agree there is no indication that those medical records were in evidence. The judge's decision reflects that he denied the insurer's motion for allowance of additional medical evidence on grounds of inadequacy and complexity of the § 11A report. (Dec. 2.) Moreover, not even the employee contends that the emergency room report and/or Dr. Ferrone's reports were in evidence. (Employee brief, 7-10.)

We note that the insurer questioned the § 11A physician at length about the August 3, 1999 New England Medical Center emergency room record, (Dep. 6-10), and even quoted from the history of injury contained in the record, (Dep. 9), to challenge the doctor's assumption that the employee twisted his knee and fell on it. Likewise, the insurer asked the impartial physician to comment on Dr. Ferrone's August 11, 1999 report in which he noted that the employee's left knee effusion, which had been present on August 3rd, had subsided. (Dep. 20-21.) It was appropriate for the insurer to question the § 11A physician as to those medical records.[4] But the judge went far beyond the deposition questioning, not only quoting from both the emergency room record and several of Dr. Ferrone's reports, none of which had been admitted in evidence, but also including in his

[4] See footnote 8, infra.

decision footnote citations to those records. (Dec. 2, 4, 5.) This was error, and because we cannot determine to what extent the histories in those non-admitted medical records influenced the judge's liability and causal relationship findings, we recommit the case to him to make such findings based solely on the record evidence.

The "A Major" Causation Standard under § 1(7A)

In addressing the liability issue presented by the employee's claim, the administrative judge wrote:

> In order to establish an insurer's liability, an employee has the burden of proving that he or she sustained a compensable personal injury *in the course of employment*, or "the service of another under a contract of hire."

(Dec. 5; emphasis added; citations omitted.) A personal injury cannot be compensable unless it is sustained "in the course of one's employment," G. L. c. 152, § 26, as that phrase has been construed by over ninety years of case law. Even if the employee satisfies that first prong of his burden of proof, he must then show that the injury "arose out of" his employment, that is, that it arose out of "the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). Historically, the definition of "arising out of" was very broad, Albert v. Welch, 360 Mass. 397 (1971), but it was narrowed considerably in 1991 when G. L. c. 152, § 1(7A), was amended to provide in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to *cause* or prolong disability or *a need for treatment*, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

(Emphasis added.) The judge stated that in order to meet that statutory standard of causation, "the Employee here must show that the events of August 2, 1999 aggravated his pre-existing condition and were a major cause of the knee condition

for which he claims §§ 13 and 30 benefits." (Dec. 6.)[5] It is in this statutory arena that the insurer makes its second argument on appeal. It contends that the judge erroneously concluded the work incident was "a major cause" of the need for the medical treatment at issue. Again, we agree.

The insurer correctly argues that the employee did not put forward evidence addressing the nature of his pre-existing condition, i.e., whether it was the result of a compensable or non-compensable injury. Even though the employee had suffered two prior work injuries to his left knee, in 1971 and 1986, (Dec. 3-4), there also was evidence that he had undergone a non-work-related surgery on the

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[5] We have held that an employee must satisfy the "a major but not necessarily predominant cause" standard under § 1(7A) only if the insurer raises that statute in defense of the employee's claim. Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003). The insurer here did not raise § 1(7A) as a defense on its issues statement, (Ex. 3), and the judge's decision does not list it as an issue raised by the insurer. (Dec. 2.) However, in her opening statement at hearing, insurer's counsel stated:

> The employee did have a significant past medical history with respect to the particular [left] knee. . . . Under the legal standard, it is the employee's burden to show that under Section 1(7A) that [sic] the current need for treatment, if there is one, which we also dispute, must be the major contributing -- the injury must be the [sic] major contributing cause.

(Tr. 4-5.) Moreover, having examined the insurer's § 11A motion for additional evidence filed two days before the hearing, which is not marked as an exhibit but is contained in the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), we note that the insurer stated it had "denied the claim based upon liability and causation pursuant to c. 152 Section 1(7A)." Although it misidentified the standard of causation required by the statute as "the major," rather than "a major," we are satisfied that the insurer properly raised § 1(7A), see Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125 (2002), that it met its burden of producing evidence that the employee came within the terms of the statute, see Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000), and that the administrative judge properly identified the standard of causation applicable to the employee's claim. Indeed, the employee does not dispute that his burden of proof was governed by § 1(7A). (Employee brief, 12.)

same knee in 1990. (Tr. 45.) Instead of addressing this issue by producing medical evidence that his prior work injuries continued to play a role in the condition of his left knee, thereby invoking the simple "as is" standard of causation, see Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229, 231-232 (2002); White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999), the employee explicitly accepted that the heightened standard of causation under § 1(7A) was part of his burden of proof. (Employee brief, 12.)

Thus, on recommittal, after the administrative judge considers only the record evidence and determines the mechanism of physical injury -- that is, precisely what happened to the employee in the August 2, 1999 van incident -- he must then determine whether that incident aggravated the employee's pre-existing knee condition and remains "a major" cause of the need for treatment. In so doing, he must rely on the exclusive medical evidence in this case -- the § 11A opinion of Dr. Goguen -- which the judge properly found "retained prima facie weight." (Dec. 2.) Because the judge did not apply that principle in practice when considering the medical issues, we agree with the insurer that the judge's liability and causal relationship findings cannot stand.

The Award of §§ 13 and 30 Medical Benefits

Even if the judge, on recommital, finds that Mr. LaGrasso sustained a compensable personal injury, that gains the employee little, however, because the judge's determination of the other issue in dispute -- the claim for §§ 13 and 30 medical benefits for a proposed total knee replacement -- was erroneous. The judge's finding that the proposed surgery was reasonable and necessary treatment for the employee's alleged August 2, 1999 aggravation injury is contrary to the sole expert medical opinion in evidence. The judge recited from Dr. Goguen's § 11A medical report:

> The question as to whether total knee arthroplasty is indicated is at this time a difficult one. He is somewhat young to undergo this procedure

> but certainly instances where the symptoms are significant enough, people of this age have proceeded with successful long lasting arthroplasties. Synvisc and steroidal injections would probably give him some short-term improvement but ultimately from the history given, total knee arthroplasty will be necessary.
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> As to when to proceed with this, I believe this is a mutual agreement between the patient and his operating surgeon as to when the quality of life is poor enough to consider this. Only [the Employee] and Dr. Ferrone [the employee's treating physician] know that and *I would be at peace to accept Dr. Ferrone's decision.*

(Dec. 7-8; emphasis in original, quoting Ex. 2.) The judge then found:

> While Dr. Goguen indicated that the Employee's decision to have surgery could go either way and that he might have recommended conservative treatment such as steroid injections before advising knee replacement surgery, he clearly supports any decision made conjointly by the patient and Dr. Ferrone. Based on Dr. Goguen's report, in which he affirmatively answered the question of whether the Employee should have the surgery, I find that the surgery is reasonable and related to his knee condition.

(Dec. 8.)

In so finding, the judge ignored Dr. Goguen's deposition testimony that he would give conservative methods of treatment a chance before having the employee undergo an invasive surgical procedure. Dr. Goguen opined that it would be better medical practice to do so, and that is the route he would take, if the employee were his patient. (Dep. 33-34, 50-52.) Dr. Goguen's above-quoted statement in his report -- that he would be at peace with whatever the employee and his treating physician decided to do -- is meaningless. It expresses no opinion whatsoever, and cannot properly be relied on to reach any particular legal conclusion.

For that reason, *inter alia*, the insurer at hearing requested a ruling that the report was inadequate, and that the parties be permitted, under § 11A(2), to introduce additional medical evidence addressing the employee's claim for medical benefits for the proposed total knee replacement surgery. (Tr. 3-13.) The inadequacy of the impartial medical report on this issue was apparent within the

four corners of the document. Section 11A does not permit an impartial medical examiner to delegate his medical determinations, or defer the opinions he is supposed to render,[6] to another physician. Thus, the written impartial report, standing alone,[7] was inadequate as a matter of law, and the judge's denial of the insurer's motion for additional medical evidence was erroneous as a matter of law.

Prior to the judge's denial of the insurer's § 11A motion, neither the employee, (see Ex. 1), nor the insurer, (see Ex. 3), had noticed an intent to depose Dr. Goguen for the purpose of cross-examination. See G. L. c. 152, § 11A(2); 452 Code Mass. Regs. § 1.12(5) and § 1.14(2). At the close of the evidentiary hearing, the insurer's motion for additional medical evidence based on inadequacy having been denied, insurer's counsel told the judge that she would depose Dr. Goguen, "[a]nd depending on the results of that, I may seek to refile a motion under Section 11A." (Tr. 77.)

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[6] General Laws c. 152, § 11A(2), provides in pertinent part:

> The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and (iii) whether or not within a reasonable degree of medical certainty any such disability has its major or predominant contributing cause a personal injury arising out of an in the course of the employee's employment. Such report shall also indicate the examiner's opinion as to whether or not a medical end result has been reached and what permanent impairments or losses of function have been discovered, if any. Such impartial physician's report shall constitute prima facie evidence of the matters contained therein.

[7] General Laws c. 152, § 11A(2), further provides in pertinent part:

> Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy *of the report* submitted by the impartial medical examiner.

(Emphasis added.)

In our view, however, when the § 11A *report* is inadequate as a matter of law, as it was here, neither party should be forced to depose the impartial physician to correct or cure the inadequacy. In this limited circumstance, due process *requires* that additional medical evidence be allowed. Compare G. L. c. 152, § 11A(2); see footnote 6, supra. The discretion vested in the administrative judge to allow additional medical evidence safeguards the due process rights of the parties only "if the judge performs this function correctly. . . ." O'Brien's Case, 424 Mass. 16, 22 (1996).[8]

That said, the insurer here did depose Dr. Goguen, and it did not renew or refile its § 11A inadequacy motion thereafter, nor did the employee mount any post-deposition challenge to the impartial doctor's opinion. The doctor's testimony at deposition can only be read to stand for the proposition that a total knee replacement was *not* reasonable and necessary medical treatment *at that*

[8] The court in O'Brien viewed two other factors as crucial to its holding that § 11A does not violate the constitutional due process rights of workers' compensation claimants and insurers: 1) the opportunity to submit to the impartial medical examiner all relevant medical records, medical reports, medical histories and other relevant information bearing on their contentions; and 2) the opportunity to challenge the § 11A report by deposing the examiner "for purposes of cross-examination."

> In such deposition and cross-examination, the challenging party may inquire into the basis of the examiner's report, whether he considered the medical records and reports submitted to him by that party, how the examiner was able to reach an unfavorable conclusion in the light of such records and reports, and in this way bring these materials to the administrative judge's attention in the stage three hearing and perhaps argue on their strength that the judge should authorize additional medical testimony.

O'Brien, supra at 23. When the impartial examiner, either by omission or, as in the instant case, by impermissible deference to the opinion of another doctor, offers *no* opinion on a medical issue in dispute, there is nothing for the aggrieved party to challenge by cross-examining the impartial physician at deposition.

time.[9] As "[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of his testifying," Buck's Case, 342 Mass. 766, 770 (1961), the employee failed his burden of proving that the proposed surgery was then reasonable and necessary. The judge's conclusion to the contrary was arbitrary and capricious, and constitutes reversible error. See Cook v. Stop & Shop Co., 15 Mass. Workers' Comp. Rep. 252, 260 (2001)(judge is not free to mischaracterize expert medical opinion).

Accordingly, we vacate the award of §§ 13 and 30 benefits and recommit the decision for reconsideration and further findings consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **March 30, 2004**

[9] The impartial medical examiner did not opine that total knee replacement surgery would never be reasonable and necessary treatment for the employee, only that conservative methods of treatment should be undertaken first. (Dep. 33-34, 50-52.) Thus, recommittal for further liability and causal relationship findings is appropriate, whether or not there are any claims for weekly incapacity and/or medical benefits to be adjudicated.